

Supreme Court, U. S.
FILED
JUN 2 1977
MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. **76-1711**

JANIE LOU UNDERWOOD and
C. J. UNDERWOOD,

Petitioners

versus

STATE OF LOUISIANA

Respondent

Petition For A Writ of Certiorari to the
Supreme Court of the State of Louisiana

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Kidd, Katz and Strickler
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Monroe, Louisiana 71201

George M. Strickler, Jr.
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New Orleans, La. 70130

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1976

NO.

JANIE LOU UNDERWOOD and C. J. UNDERWOOD
Petitioners

versus

STATE OF LOUISIANA
RespondentPetition For A Writ of Certiorari to the Supreme Court
of the State of Louisiana

Petitioners were convicted in the Fourth Judicial District Court of Ouachita Parish, Louisiana, on March 2, 1977, of selling beer on Sunday in violation of a parish ordinance. Because these were misdemeanor convictions, the only appellate review was by way of application for certiorari to the Louisiana Supreme Court under that Court's supervisory jurisdiction. Art. 5, § 5(e) Louisiana Constitution. Petitioner's application for writs of certiorari to the Louisiana Supreme Court, contending that their convictions were products of selective, discriminatory law enforcement in violation of their Fourteenth Amendment right to equal protection of the laws, was denied on April 22, 1977. Petitioners respectfully pray that a Writ of Certiorari issue to review that denial of writs by the Louisiana Supreme Court.

Opinions Below

There is no written opinion from the courts below. The

denial of writs by the Louisiana Supreme Court is in a handwritten note on the file. "Application denied. The showing made does not warrant the exercise of our jurisdiction." A copy of that note is attached hereto as Appendix D.

Jurisdiction

This Court's jurisdiction is involved under 28 U.S.C. §1257(3).

Questions Presented For Review

Whether selective enforcement of a Sunday closing law violated petitioners' right to equal protection of the laws under the Fourteenth Amendment.

Constitutional Provisions and Statutes Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinance Number 7147 (1963) of Ouachita Parish provides as follows:

AN ORDINANCE TO REGULATE AND CONTROL THE HOURS OF OPERATION OF PLACES OF BUSINESS WHERE ALCOHOLIC BEVERAGES AND BEER ARE SOLD OR STORED FOR SALE AT RETAIL.

SECTION 1. BE IT ORDAINED by the Police Jury of the Parish of Ouachita, State of Louisiana, in regular sessions convened, that it shall be unlawful for any dealer, as heretofore defined and particularly as defined in and by Ordinances No. 6031 and 6032, to sell any alcoholic beverages, liquor or beer between the hours of twelve midnight on Saturday and six o'clock a.m. of the following Monday, and between the hours of twelve midnight and six o'clock a.m. on all other days of the week.

SECTION 2. BE IT FURTHER ORDAINED, ETC., That all public dance halls, cabarets, night clubs, road houses, saloons and places of public entertainment where alcoholic beverages, liquor or beer are sold or stored for sale at retail shall close their respective places of business at twelve midnight and shall remain closed until six o'clock a.m., except they are to stay closed from twelve midnight Saturdays until six o'clock a.m. of the following Monday.

SECTION 3. BE IT FURTHER ORDAINED, ETC., The provisions of Section 2 shall apply not to any bona fide cigar stand, newsstand, drugstore, hotel, motel, grocery store, sporting, fishing or hunting goods store or shop, restaurant or other places where food or non-alcoholic beverages are served, provided no cigar stand, newsstand, drugstore, hotel, motel, grocery store, sporting, fishing or hunting goods store or shop, restaurant or other places where food or non-alcoholic beverages are served, shall sell

or serve in, on or about such premises any alcoholic beverages, liquor or beer from twelve midnight until six o'clock a.m. of the following morning, and twelve midnight Saturday until until six o'clock a.m. on the following Monday morning. During the period hereinabove provided, such places of business shall keep all alcoholic beverages, liquor or beer covered up.

BE IT FURTHER ORDAINED, ETC., That whosoever shall violate the provisions of this Ordinance shall be guilty of a misdemeanor and fined not more than ONE HUNDRED AND 00/100 (\$100.00) DOLLARS or be imprisoned for no longer than NINETY (90) DAYS, or both.

BE IT FURTHER ORDAINED, ETC., That all Ordinances or parts of Ordinances in conflict or inconsistent herewith be and the same are hereby repealed.

This Ordinance having been read in full and considered, voted on by YEA AND NAY vote, the vote on final passage being 8 YEAS, 5 NAYS, AND 3 ABSENT, or NOT VOTING 0, adopted March 19th, 1963.

NAYS:

Mrs. Kincaid,
Mr. Avant,
Mr. Hamm,
Mr. Brown
Mr. Wilson

YEAS:

Mr. Studdard Mr. Coon
Mr. Carpenter Mr. Roberts
Mr. Earle Mr. Kilpatrick
Mr. M. W. Montgomery Mr. Fourmy

ABSENT:

Mr. Hicks, Mr. Pettit and Mr. A. E. Montgomery, Sr.

/s/ L.U. Fourmy
PRESIDENT, PRO TEMPORE
Ouachita Parish Police Jury

/s/ Nell M. Cheek
SECRETARY

Ouachita Parish Police Jury

STATEMENT OF THE CASE

C. J. Underwood and his wife Janie Lou, the owners of a grocery store and night club in Ouachita Parish, Louisiana were charged by bill of information with the sale of beer on Sunday (August 29, 1976) in violation of Parish Ordinance No. 7147 which prohibits the sale of alcoholic beverages between the hours of 12:00 midnight on Saturday and 6:00 a.m. the following Monday.

In September and October the Underwoods and their attorney conducted an investigation of the enforcement of the ordinance with respect to other alcoholic beverage outlets in the parish by the Sheriff's office. As a result of the investigation, the Underwoods filed a Motion To Quash the bill of information. (Appendix A) alleging in part that:

Quachita Parish Ordinance No. 7147, Section 1-4, 2-19-63 (Sec. 2-1, Compiled Ordinance) is unconstitutional in that it is not applied indiscriminately and it therefore denies defendants equal protection under the law, in violation of their rights under Article I, Section 3 of the Louisiana Constitution and Amendment 14 to the United States Constitution.

Defendants further show that the ordinance under attack is enforced against whites as a class, of which defendants are members, and is not enforced against blacks as a class. Defendants show that this is reverse discrimination.

A hearing was conducted on the Motion To Quash on January 6 and 7, 1977. Gary Galloway, a private investigator, testified that between September 21st and 26th he visited numerous bars and other establishments with retail liquor licenses on Sundays and after hours¹ (Tr. 3-4). His preliminary survey convinced him that black bars (establishments owned by and frequented mainly by blacks) were selling alcoholic beverages in violation of the ordinance, but that white bars and clubs were not. (Tr. 4-9). Galloway's conclusion was based on his observing crowds of people moving in and out of the black bars he visited and of hearing loud music playing inside (Tr. 8-9). By contrast, the white bars appeared to be closed (Tr. 7, 23, 26). Galloway subsequently hired two black men, Huey Van Dyke and Robert Earl Brazail, to assist in the investigation. (Tr. 9). Van Dyke was a Pinkerton Security guard at the Continental Can plant in Hodge, Louisiana, and was a former Jackson Parish Deputy Sheriff (Tr. 92-93). Brazail had worked undercover for a state police drug investigation. (Tr. 134). Van Dyke and Brazail were instructed to enter the various black bars identified by Galloway on Sunday and after midnight and purchase alcoholic beverages for evidence. (Tr. 9). On October 3rd and 10th (both Sundays) Van Dyke and Brazail visited a total of ten bars and restaurants (including one American Legion Hall) on at least two occasions each. (Tr. 99-124, 134-157). Each of the bars were open and selling beer or other alcoholic beverages to customers. At each of the bars, Van Dyke and Brazail purchased beer or hard liquor and preserved the bottles for evidence. Eleven bottles of various kinds of liquor were introduced as Underwood Exhibits # 2-12. In further support of their testimony, Van Dyke and Brazail took photographs of the in-

1. Ordinance 7147 also prohibits the sale of alcohol between 12:00 midnight and 6:00 a.m. on weekdays. *Supra*

teriors of some of the bars showing beer and other beverages being served to patrons. These photographs were introduced as Underwood Exhibits #13-26. Another witness, Linda Gilbert, identified herself in one of the photographs (Underwood #29) and confirmed that she had purchased alcoholic beverages on that occasion, which was a Sunday (Tr. 90-91).

Various bar owners appeared and flatly denied ever selling alcoholic beverages in violation of the ordinance (Tr. 34-45, 58-61, 68-70, 79-82, 82-83, 85-88, 89-90). No explanation was furnished for the testimony of Van Dyke, Brazail, Galloway and Gilbert.

At the close of the evidence, the trial judge denied the motion to quash for failure "to meet the burden of proof". Appendix B. Defendants were tried on March 2, 1977. C.J. Underwood testified and admitted selling beer on the occasion alleged in the information (Trial Tr. 38). Underwood further testified that black clubs in the vicinity violated the ordinance regularly with impunity (Trial Tr. 39-40). Underwood further testified that, to stay open after hours, law enforcement officials in the parish would have to be paid and that he would not make pay-offs. (Trial Tr. 44). Underwood's father-in-law, A. D. Stanfield, a former Deputy Sheriff had been highly critical of the selective enforcement of the Sunday closing laws and had made affidavits describing the system. These affidavits were introduced as Underwood Trial Ex.# 1 & 2.

Both defendants were convicted and sentenced to pay \$100.00 fines. C. J. Underwood was, in addition, sentenced to serve thirty (30) days in the parish jail. Appendix C. Defendants petitioned the Louisiana Supreme Court for writs of certiorari or review of their convictions. The sole

contention made in that petition was that the selective enforcement of the statute violated petitioners right to equal protection as guaranteed by the Fourteenth Amendment and Art. 1, Sec. 3 of the Louisiana Constitution. On April 22, 1977, the Louisiana Supreme Court denied the writ application without opinion. Appendix D. The trial judge stayed execution of the sentence pending action by this Court on the application for certiorari.

ARGUMENT

The Writ Should Be Granted So That The Court Might Determine Whether The Arbitrary And Sporadic Enforcement of Sunday Closing Ordinance Against White Liquor Outlets Constituted A Violation of The Equal Protection Clause of the Fourteenth Amendment With Respect To Those Convicted of Violation Of The Ordinance

It is well settled that the equal protection clause of the Fourteenth Amendment is directed to every form of state action, whether legislative, judicial or executive. See, *Ex Parte Virginia*, 100 U.S. 339, 347 (1880); *United States v. Raines*, 362 U.S. 17 (1960).

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) this Court ruled that the discriminatory administration of a valid statute was constitutionally prohibited.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons

in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-74.

In *Yick Wo*, petition had been convicted of violating an ordinance that made it a misdemeanor to maintain a laundry without first obtaining the consent of a municipal board unless the laundry was in a brick building. The Court reversed the defendant's conviction on the ground that the board had discriminated against persons of Chinese ancestry by denying their applications for permits while granting permits to white persons.

The discrimination condemned in *Yick Wo* involved not the activities of police, but the administrative actions of a licensing board, but the Court subsequently indicated that discriminatory penal enforcement would also fall within the *Yick Wo* rule. In *Ah Sin v. Whittman*, 198 U.S. 500 (1905), the defendant, convicted of visiting a barricaded gambling room in violation of an ordinance, challenged the conviction on the ground that the ordinance was only enforced against Chinese. The Court affirmed a denial of habeas corpus, but did so only because defendant had failed to prove discrimination in the enforcement of the ordinance. 198 U.S. at 508. In *Edelman v. California*, 344 U.S. 357 (1953), it was argued that petitioners' conviction for violating a vagrancy ordinance was void under *Yick Wo* because of discriminatory enforcement of the ordinance. Although this Court dismissed the writ of certiorari as improvidently granted, because the decision rested on adequate state procedural grounds, it set forth petitioners' offer of proof on the selective enforcement issue and

characterized the offer as "doubtless" made in recognition of "the necessity of showing systematic or intentional discrimination". 344 U.S. at 359. Underlying this language is the assumption that systematic or intentional discrimination would have been a defense to prosecution.

In this case, defendants have proved that black bars and night clubs in Ouachita Parish operate in open and flagrant disregard of the Sunday closing ordinance. The testimony and physical evidence of the violations and non enforcement of the law is overwhelming. The only response to this evidence were denials by the bar owners that they had violated the law. The liquor purchased, the photographs and the testimony of defense witnesses were not explained. According to the prosecution, the Sheriff's office was notified by a black inmate of the Ouachita Parish Jail, Gilbert Lee Wilson, that he had seen people buy beer at Underwood's store on Sundays. The Sheriff's office promptly gave Wilson money and sent him into Underwood's to make a purchase. (Testimony of Deputy Joseph Jackson and Gilbert Wilson at trial). It is absolutely unbelievable that the Sheriff's office has not received some hint that bars and night clubs all over the parish are going full tilt well after the legal closing hours. In light of the evidence, it is clear that there is an intentional failure to enforce the ordinance in the black communities. Such selective enforcement plainly constitutes a denial of equal protection. In *Oyler v. Boles*, 368 U.S. 448 (1962), a challenge to the application of a habitual offender statute (mandatory penalty) the Court noted:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this

case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjust standard such as race, religion, or some other arbitrary classification.

368 U.S. at 456.

The element of an "unjust standard" is supplied in this case by the evidence of racial bias in the enforcement of the ordinance.

CONCLUSION

Though there is no right to violate an ordinance, there is a right to equal treatment in its enforcement. Defendants in this case violated the law, but the law has not been applied equally to them and other violators. This unequal enforcement constituted a denial of equal protection and should have resulted in a dismissal of the charges. For this reason, petitioners pray that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Telephone (504) 561-5845

PAUL H. KIDD
709 Jackson Street
Monroe, Louisiana 71201
Telephone (318) 325-3884

BY: _____
 Attorneys for Janie Lou and C.J.
 Underwood

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was mailed to Ms. Stephanie Dawson, Assistant District Attorney, Ouachita Parish Court House, Monroe, Louisiana, this 20th day of May, 1977.

 GEORGE M. STRICKLER, JR.

APPENDIX A

MOTION TO QUASH

STATE OF LOUISIANA - PARISH OF OUACHITA
 FOURTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

FILED:

VERSUS

NO. 35,674

C. J. UNDERWOOD AND
 JANIE LOU UNDERWOOD

BY:
 DEPUTY CLERK

MOTION TO QUASH

NOW INTO COURT, through undersigned counsel, come defendants, C. J. Underwood and Janie Lou Underwood, and respectfully move that the bill of information filed herein against them be quashed for the foregoing reasons, to-wit:

1. Ouachita Parish Ordinance No. 7147, Section 1-4, 2-19-63 (Sec. 2-1, Compiled Ordinances) is unconstitutional on its face in that it violates defendants' rights under Article I, Section 1, 2, 3, 4, 5, and 12 of the Louisiana Constitution and Amendments 1, 5, and 14 of the United States Constitution; and

2. Ouachita Parish Ordinance No. 7147, Sections 1-4, 2-19-63 (Sec. 2-1, Compiled Ordinances) is unconstitutional in that it is not applied indiscriminately and it therefore denies defendants equal protection under the law, in violation of their rights under Article I, Section 3 of the

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Louisiana Constitution and Amendment 14 to the United States Constitution.

Defendants show further that the ordinance under attack is enforced against whites as a class, of which defendants are members, and is not enforced against blacks as a class. Defendants show that this is reverse discrimination.

Defendants show further that the ordinance under attack seeks to enforce the provincialism of a regional religion by attempting to coerce the tenets of such religious moral precepts on defendants, contrary to their own culture and/or their own religious ideas, beliefs, and affiliations.

WHEREFORE, defendants pray that the ordinance under attack be declared unconstitutional and the bill of information filed herein against them be quashed.

RESPECTFULLY SUBMITTED,

KIDD, KATZ & STRICKLER
A PROFESSIONAL CORPORATION
709 JACKSON STREET
MONROE, LOUISIANA 71201
ATTORNEYS FOR DEFENDANTS

BY: S/ Paul H. Kidd
PAUL HENRY KIDD

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CERTIFICATE

I, the undersigned counsel, do hereby certify that a copy of the above and foregoing has been served on Hon. J. Carl Parkerson, District Attorney, by placing same in the U.S. mail, postage prepaid, and addressing it to: Ouachita Parish Courthouse, 300 St. John Street, Monroe, Louisiana 71201, this 10th day of November, 1976.

s/ Paul H. Kidd
PAUL HENRY KIDD

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APPENDIX B - Denial of Motion to Quash

Friday, January 7, 1977

Division D, Courtroom No. 2

Court opened pursuant to adjournment. Present: Hon. William Norris, III, Judge; Grace Hudnall and Martha Green, Court Reporters; Pamela Robertson and Ed Hemphill, Deputy Sheriffs; Donald L. Sims and Dorothy L. Dunn, Deputy Clerks.

M 35674 State of Louisiana vs. C.J. Underwood

M 35674 State of Louisiana vs. Janie Lou Underwood

Defendants present and each represented by Hon. Paul Henry Kidd. Hearing on Motion to Quash resumed. Evidence adduced in part and continued, to be reset by the Court.

Minute Book 40 Page 400

Wednesday, February 2, 1977

Division C, Courtroom No. 3

Court opened pursuant to adjournment. Present: Hon. Robert T. Farr, Judge; Omer Weir and Ed Hemphill, Deputy Sheriffs; Diane Capers and Sharie Williams, Deputy Clerks; Grace Hudnall, Court Reporters.

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M 35674 State of Louisiana vs. C.J. Underwood and Janie Lou Underwood

Hon. Paul Henry Kidd, Brian Crawford and Stephanie Dawson present. Hearing on Motion to Quash resumed. Evidence adduced and closed. It was ordered by the Court that the defendant has failed to meet the burden of proof and the Motion To Quash is hereby denied. At this time Mr. Kidd asked that the testimony be transcribed, and gave oral notice of his intent to apply for Writs to the Supreme Court. The Court denied the request for the transcript, and denied the notice of Writs prior to the time of trial on the merits.

Minute Book 40 Page 510

A TRUE COPY

S/ Lucille LaPietea

Dy. Clerk of Court

Ouachita Parish, La.

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APPENDIX C - Convictions and Sentence

Wednesday, March 2, 1977

Divisions D & A, Courtroom No. 2

Court opened pursuant to adjournment. Present: Hons. William Norris, III and Fred Fudickar, Jr., Judges; Martha Green, Court Reporter; Pamela Robertson and Ed Hemphill, Deputy Sheriffs; Donald L. Sims and Dorothy L. Dunn, Deputy Clerks.

HON. WILLIAM NORRIS, III, JUDGE

M 35674 State of Louisiana vs. Janie Lou Underwood

M 35674 State of Louisiana vs. C.J. Underwood

Defendants present and represented by Hon. Paul Henry Kidd. Cases taken up and tried, evidence adduced and closed, and each defendant was by the Court found guilty and Defendant JANIE LOU UNDERWOOD was sentenced to pay a fine of \$100.00 and costs, default 20 days, and sentenced to serve thirty (30) days in the Ouachita Parish Jail, and said jail sentence was suspended and defendant placed on unsupervised probation for a period of one (1) year. Defendant C.J. UNDERWOOD was sentenced to pay a fine of \$100.00 and costs, default 20 days, and sentenced to serve thirty (30) days in the Ouachita Parish Jail. At this time, Mr. Kidd filed Notice of Intention to Apply to the Supreme Court of Louisiana for Writs of Certiorari or Review, Prohibition, Mandamus, and for a Stay Order. The Court accepted said notice and granted a stay of execution

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of sentence until the appeal is disposed of finally and fixed

March 21, 1977, as deadline for writs to be filed.

Minute Book 40 Page 656

A TRUE COPY
S/ Lucille LaPietea
Dy. Clerk of Court
Ouachita Parish, La.

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APPENDIX D - Denial of Writ Application

ORIGINAL REMEDIAL WRIT ORIGINAL

No. 59554

SUPREME COURT
Of the
STATE OF LOUISIANA

Filed: March 21, 1977

s/ Andrew J. Falcon
Dy. Clerk

STATE OF LOUISIANA

VERSUS

JANIE LOU UNDERWOOD and C. J. UNDERWOOD

In re: Janie Lou Underwood and C. J. Underwood

Applying for writs of certiorari or review.

Application denied. The showing made does not warrant the exercise of our jurisdiction.

JAD, Jr.
JWS
FWS
AT, Jr.
PFC
WFM
JLD